STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW

In re:	)	1998 OAL Determination No. 17
Request for Regulatory Determination filed by PRISONERS RIGHTS UNION regarding various policies of the DEPARTMENT OF CORRECTIONS regarding parole transfers[1]	)	[Docket No. 91-015]
	)	August 20, 1998
	)	Determination Pursuant to Government Code Section 11340.5; Title 1, California Code of Regulations, Chapter 1, Article 3

Determination by: **EDWARD G. HEIDIG, Director**

HERBERT F. BOLZ, Supervising Attorney
CINDY PARKER, Administrative Law Judge
on Special Assignment
Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law ("OAL") is whether certain policies regarding out-of-county parole transfers are "regulations" and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

OAL has concluded that the policies are, in part, "regulations," and, in part, restatements of existing law. If the Department wishes to exercise its discretion to issue parole relocation criteria, it may adopt regulations pursuant to the APA through either the regular or the emergency rulemaking process.

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ISSUE

OAL has been requested to determine whether policies limiting out-of-county parole transfers to one particular county are "regulations" required to be adopted pursuant to the APA.[2] Jacqueline Henss filed this request on behalf of the Prisoners Rights Union.

ANALYSIS

I. IS THE APA GENERALLY APPLICABLE TO THE DEPARTMENT OF CORRECTIONS' QUASI-LEGISLATIVE ENACTMENTS?

Penal Code section 5058, subdivision (a), declares in part that:

> 'The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . . The rules and regulations *shall be promulgated and filed pursuant to [the APA]* . . . . [Emphasis added.]"

Clearly, the APA generally applies to the Department's quasi-legislative enactments.[3]

After this request was filed, Penal Code section 5058 was amended to include several express exemptions from APA rulemaking (subdivisions (c) and (d)). None applies here.

II. DO THE CHALLENGED RULES CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

Government Code section 11342, subdivision (g), defines "regulation" as:

> ". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any such rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . . [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

> "(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

In *Grier v. Kizer*,[4] the California Court of Appeal upheld OAL's two-part test[5] as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is *not* a "regulation" and *not* subject to the APA. In applying the two-part test, however, OAL is mindful of the admonition of the *Grier* court:

> ". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.* [Emphasis added.]"[6]

Background of the Challenged Rule

Prisoners released on parole (or about to be released) sometimes request that they be paroled, not in the county from which they were committed to prison, but rather in a different county. In 1991, the Department detected an increase in the number of prisoners or parolees succeeding in having their parole transferred from other counties to one particular county. A departmental memo dated February 11, 1991 (attached as Appendix "A" to this determination, following the endnotes) directed that staff apply a series of "specific and unique transfer criteria" to requests to transfer parole to Sacramento County, and stated that final approval was "reserved" to the Regional Administrator. According to the memo, the new criteria were needed to address two types of concerns: (1) local and (2) those of the Department's Parole and Community Services Division. After reviewing the memo in the context of (1) the request for determination and (2) the Department's response to the request, OAL infers from the memo that it was directed to departmental staff who reviewed all requests to transfer parole to Sacramento County (and had previously had the power to approve such requests without further review).

The Prisoners Rights Union challenges three rules used by the Department in reviewing requests to transfer parole to Sacramento County. The written rule is found in the 1991 departmental memo. Two of the rules are unwritten. According to the requester, the Department's Parole and Community Services Division verified the existence of the two unwritten rules.[7]

An earlier OAL determination involving parole transfer policies contained in section 1000 of the Department's "Parole and Community Services Division Manual" found that portions of those policies were "regulations." These earlier parole transfer policies were similar, but not identical, to those involved in this determination. In the earlier determination, those portions which restated the provisions of the governing law (Penal Code section 3003) were found not to be "regulations."[8]

A. ARE THE CHALLENGED RULES "STANDARDS OF GENERAL APPLICATION?"

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[9]

It appears from the request, the memo, and the agency response that the challenged memo applied to all prisoners or parolees seeking to transfer parole from other California counties to Sacramento County. It thus applied to all members of a statewide class.[10] Therefore, we conclude that the written rule contained in the memo was a standard of general application.

Were the two unwritten rules also standards of general application? According to the requester, the first unwritten rule permitted the Department to deny a parole transfer based upon the nature of the crime, even when the crime was non-violent. According to the requester, the second unwritten rule encouraged staff to deny parole transfers requests to a city if the spouse moved to that city to be closer to the inmate. Though it is not entirely clear from the request and the response, OAL will assume for purposes of analysis that both unwritten rules applied to transfer requests to Sacramento County. Whether the two unwritten rules applied to all requests to transfer parole to Sacramento County or to other counties, they were standards of general application.

B. DO THE CHALLENGED RULES INTERPRET, IMPLEMENT, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE AGENCY OR GOVERN THE AGENCY'S PROCEDURE?

Penal Code section 5058, subdivision (a), declares that

> "The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons . . . ."

Penal Code section 5054 declares that

> "The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and

employment of persons confined therein are vested in the director [of the Department of Corrections] . . . ."

Penal Code section 3000 requires the Department to meet with each inmate prior to release to provide the conditions and length of parole under the guidelines specified by the Board of Prison Terms.

At the time of the request, Section 3003 of the Penal Code[11] stated the criteria for determining the appropriate location for the parole of an inmate of the California state prisons as follows:

"(a) An inmate who is released on parole shall be returned to the county from which he or she was committed.

"For purposes of this subdivision, 'county from which he or she was committed' means the county where the crime for which the inmate was convicted occurred.

"(b) Notwithstanding subdivision (a), an inmate may be returned to another county in a case where that would be in the best interests of the public and of the parolee. If the Board of Prison Terms setting the conditions of parole for inmates sentenced pursuant to subdivision (b) of Section 1168 or the Department of Corrections setting the conditions of parole for inmates sentenced pursuant to Section 1170 decides on a return to another county, it shall place its reasons in writing in the parolee's permanent record. In making its decision, the authority may consider, among others, the following factors:

"(1) The need to protect the life or safety of a victim, the parolee, a witness or any other person.

"(2) Public concern that would reduce the chance that the inmate's parole would be successfully completed.

"(3) The verified existence of a work offer, or an educational or vocational training program.

"(4) The last legal residence of an inmate having been in another county.

"(5) The existence of family in another county with whom the inmate has maintained strong ties and whose support would increase the chance that the inmate's parole would be successfully completed.

"(6) The lack of necessary outpatient treatment programs for parolees receiving treatment pursuant to Section 2960.

"(c) Notwithstanding any other provision of law, an inmate who is released on parole shall not be returned to within 35 miles of the actual residence of a victim or, or a witness to, a violent felony as defined in subdivision (c) of Section 667.5, if the Board of Prison Terms or the Department of Corrections finds that there is a need to protect the life, safety, or well-being of a victim or witness.

"(d) An inmate may be paroled to another state pursuant to any other provision of law."

The challenged written rule differs from section 3003 of the Penal Code in the following ways:

1. It omits from consideration "the need to protect the life or safety of a victim, the parolee, a witness or any other person."

2. It omits from consideration "public concern that would reduce the chance that the inmate's parole would be successfully completed."

3. It interprets the statutory factor that an inmate's "last legal residence" before commitment was in another county by requiring that the last legal residence of the parolee was in Sacramento County for at least one year. Documentation is required and fugitive/suspended time is not considered.

4. It interprets the statutory factor of the existence of family with whom the inmate has maintained strong ties and whose support would increase the chance that the inmate's parole would be successfully completed by requiring that there be an offer of continued immediate family support in Sacramento County. The challenged rule adds a definition of immediate

family which excludes aunts, uncles, cousins, common law spouses ,and spouses who married the inmate while the inmate was in prison (prison marriages).

5. It adds to the statutory factor that there be a verified existence of a work offer the requirement that the offer be unique, that it enables the parolee to be financially self-sufficient and that it cannot be duplicated in the county of commitment. As to the statutory factor that there be a verified existence of an educational or vocational training program, the challenged rule adds that the training program must be full-time, must be fully established in Sacramento County, must substantially improve future employability, must provide the parolee with sufficient funds to prevent reliance on certain assistance programs and must not be capable of duplication in the county of commitment.

6. Where section 3003 allows for consideration of the lack of necessary outpatient treatment programs for parolees receiving treatment pursuant to section 3003, the challenged written rule omits this factor from possible consideration.

7. The challenged written rule also adds as a factor for consideration whether the parolee is an interstate compact case and is not subject to county of commitment laws. This appears to be an interpretation of subdivision (b)(6)(d) of section 3003 which provided that an inmate may be paroled to another state pursuant to any other provision of law.

In summary, the challenged written rule deletes three of the discretionary criteria set forth in section 3003 which may be considered in deciding out-of-county transfer requests. The deletions thus interpret section 3003 by reducing the review criteria applied to out-of-county parole transfer requests to Sacramento County.

The challenged written rule adds language to the three remaining criteria in the statute. This language, which defines "family," what constitutes an adequate work offer and an adequate educational or training program, interprets and makes specific code section 3003. As the requester contends, the language of the challenged written rule also precludes the possibility of an inmate being released to Sacramento County if his or her spouse has established residency there, *unless* the inmate actually legally resided in Sacramento County for one year prior to his

or her commitment to prison. The statute, by contrast, allows for consideration of the county in which the claimant last resided. It does not require the claimant to have legally resided there; it does not specify a required length of time for such residence.

Finally, the challenged written rule adds a criterion which appears to interpret language in section 3003 regarding parole to other states.

The Department contends that the language of the challenged rule does not conflict with the language of Code section 3003. While this may be largely true, it is not the issue at hand. The issue is whether the challenged rules interpret, implement or make specific the law enforced or administered by the Department.

The Department also contends that by eliminating in its written rule three of the criteria in the statute which may be, but are not required to be, considered it has *not* interpreted the statute. OAL disagrees. Without the challenged rule, an administrator could consider the need to protect the life or safety of a victim, the parolee, a witness or any other person. The administrator could also consider "public concern that would reduce the chance that the inmate's parole would be successfully completed" and the lack of necessary outpatient treatment programs. These specific criteria may not be considered under the challenged written rule.

To the extent that the written rule repeats the statute, it is not a "regulation." However, to the extent that the Department has interpreted, implemented or made specific Penal Code section 3003 by selecting and defining certain of the statutorily authorized criteria for consideration in make parole transfer decisions and eliminating others, the Department has issued a rule that is subject to the APA and is without legal effect unless adopted pursuant to the APA.

The requester contends that the Department also had an unwritten rule to deny a parole transfer based upon the nature of the crime even when the crime was non-violent. As mentioned earlier, the 1991 version of Code section 3003 contained language which allows, but does not require, the Department to grant a parole transfer to another county in a case where that would be in the best interests of the public and of the parolee. It further provided in subsection (c) that an inmate released on parole shall not be returned to within 35 miles of the actual residence of a victim, or a witness to a violent felony if the Department finds there is a need to protect the life, safety or well-being of a victim or witness. This provision

allowed for consideration of the nature of the crime in certain circumstances Nothing in the statute required that a parole transfer be denied based upon the nature of the crime. Assuming that the asserted unwritten rule existed in 1991, it interpreted and made specific Code section 3003. Therefore, we conclude that this unwritten rule is a "regulation" within the meaning of Government Code section 11342.

Finally, the requester contends that the Department had an unwritten rule under which the Department refused to grant further consideration to a request for parole relocation in a certain city when it determined that the spouse moved to that city to be closer to the inmate, even if the spouse had established residency in that city. The statute provided that the Department *may* consider the existence of family in the county (to which transfer is sought) with whom the inmate has maintained strong ties and whose support would increase the chance that the inmate's parole would be successfully completed. The unwritten rule would deny consideration of a parole transfer to a county if the inmate had not resided in that county prior to incarceration, and therefore his or her spouse moved to the county during the incarceration to be nearer to the inmate. The unwritten rule implements, interprets, and makes specific section 3003, and is, therefore, a "regulation."

Since the request was made, Penal Code section 3003 was amended to provide that an inmate released on parole shall ordinarily be returned to the county of last legal residence. The amended statute *requires* the Department to consider the listed factors and gives the greatest weight to the protection of the victim and the safety of the community. Many of the factors in the revised statute are similar or identical to those in the 1991 version of the statute. For example, the statute now requires, rather than allows for, consideration of "The need to protect the life or safety of a victim, the parolee, a witness or any other person," and "Public concern that would reduce the chance that the inmate's parole would be successfully completed." These are both deleted from the unwritten rule. Therefore, portions of the challenged written and unwritten rules continue to constitute "regulations" except where they restate the provisions of Code section 3003.

III. DO THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.[12] Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.[13]

We conclude that none of these general exemptions apply here.

CONCLUSION

For the reasons set forth above, OAL finds that:

(1) Any unwritten policy to deny parole transfer to a particular county to any inmate who did not legally reside in that county for one year prior to his or her incarceration is a "regulation," and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act.

(2) Any unwritten policy to deny parole transfer based upon the nature of the crime is a "regulation," and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act.

(3) Those portions of the written policy which modify or supplement Penal Code section 3003 are "regulations,"and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act.

(4) Those portions of the written policy which merely restate the provisions of Penal Code section 3003 need not be adopted pursuant to the APA.

DATE: August 20, 1998

Herbert F. Bolz

HERBERT F. BOLZ
Supervising Attorney

For Herbert F. Bolz

CINDY PARKER, Administrative Law Judge
on Special Assignment
Regulatory Determinations Program
Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, California 95814
(916) 323-6225, CALNET 8-473-6225
Telecopier No. (916) 323-6826
Electronic mail: staff@oal.ca.gov

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ENDNOTES

1. This Request for Determination was filed by Jacqueline Henss on behalf of the Prisoners Rights Union, 1909 Sixth Street, Sacramento, California, (916) 441-4214. The Department of Corrections was represented by Peggy McHenry of the Regulations and Policy Management Branch, 1515 "S" Street, North Building, P.O. Box 942883, Sacramento, CA 94283-0001, (916) 327-4270.

2. According to Government Code section 11370:

> "*Chapter 3.5* (commencing with Section 11340), *Chapter 4* (commencing with Section 11370), *Chapter 4.5* (commencing with Section 11400), *and Chapter 5* (commencing with Section 11500) *constitute*, and may be cited as, *the Administrative Procedure Act*." [Emphasis added.]

We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

3. The APA would apply to the Department's rulemaking even if Penal Code section 5058 did not expressly so provide. The APA applies generally to state agencies, as defined in Government Code section 11000, in the executive branch of Government, as prescribed in Government Code section 11342, subdivision (a).

4. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 200, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

Tidewater itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a

case which quotes the test from *Grier v. Kizer*.

5. The *Grier* Court stated:

> "The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, *supra*, slip op'n., at p. 8.)

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was belatedly published in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

6. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

7. The Department's response does not specifically deny that such unwritten rules existed. It is OAL's experience that when agencies believe that alleged unwritten rules do not or did not in fact exist, that they make this point quite unequivocally. The Department's response, by contrast, merely "denies each and every *conclusion* and *opinion*" in the request (emphasis added, p. 3). Whether an unwritten rule exists is a factual question. The requester swore under penalty of perjury that two such unwritten rules existed. The Department did not specifically deny that such rules existed. If the two unwritten rules did not in fact exist, then there is no APA problem.

8. **1990 OAL Determination No. 14** (Department of Corrections, November 2, 1990, Docket No. 89-021), CRNR 90, No. 47-Z, p. 1733

9. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See, *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).

10. The Department did not argue that the memo fell within the "local rule" exception, Penal Code section 5058, subdivision (d).

11. Penal Code section 3003 was amended in 1992, 1994, 1995, 1996 and 1997.

12. Government Code section 11346.

13. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

    a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)

b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec.11342, subd. (g).)

c. Rules that "[establish] or [fix], *rates, prices, or tariffs*." (Gov. Code, sec. 11343, subd. (a)(1).)

d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (e).)

f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found in 1991 OAL Determination No. 6, pp. 175-177. Like *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, **1990 OAL Determination No. 6** (Department of Education, Child Development Division, March 20, 1990, Docket No. 89-012), California Regulatory Notice Register 90, No. 13-Z, March 30, 1990, p. 496, rejected the idea that *City of San Joaquin* (cited above) was still good law.

State of California

Flanagan

Memorandum

Department of Corre

Date February 11, 1991

To Jim Oliver, Field Administrator
Sacramento Unit Supervisors

Subject: OUT OF COUNTY TRANSFERS

Recent statistics reflect an increase in out-of-county transfers to Sacramento County. Due to local and P&CSD concerns, it is now necessary to implement a specific and unique transfer criteria for Sacramento county.

Attached is the exception criteria to be used for Sacramento transfer requests. Each request will be investigated on a case by case basis, with final approval reserved for my office.

Your cooperation effecting this policy is anticipated. Further concerns and/or questions should be directed to me at Regional headquarters.

HENRY J. PERALTA
Regional Administrator

cc: Midge Carroll
Chuck Wilcots
Ron Chun
Jerry DiMaggio
Bob Bowman
Field Administrators
Unit Supervisors

CDC 1817 (5/89)

App. "A"

The following exceptional criteria for placement in Sacramento county is the only criteria to be submitted for out of county transfer consideration: (3003 (b) P.C.)

1. Fearful victim (Omitted).

2. Public interest (Omitted).

3. At time of commitment, last legal residence of parolee was in Sacramento county for at least one year. This must be documented in the file and fugitive/suspended time will not be considered.

4. Parolee has maintained strong family ties while incarcerated and has an offer of continued immediate family support in Sacramento county. (Immediate family members are defined as follows: legal spouse; natural parents; adoptive parents, if the adoption occurred and a family relationship existed prior to inmate's incarceration; step-parents or foster parents; grandparents; brothers and sisters; the inmate's natural and adoptive children; step-children or grandchildren. Aunts, uncles and cousins are not considered as immediate family members unless a bonafide foster relationship exists. Prison marriages/common-law relationships will not be considered (CDC Operations Manual 81010.2).

5. Parolee has unique verified employment offer in Sacramento county that enables the parolee to be financially self-sufficient and cannot be duplicated in county of commitment.

6. Parolee is an interstate compact case and is not subject to county of commitment laws.

7. Parolee has a full-time training or education program fully established in Sacramento county which will substantially improve future employability and will provide sufficient funds to preclude the parolee from relying on welfare, CDC cash assistance, or similar programs. Again, this opportunity must be verified, unique and cannot be duplicated in county of commitment.

8. Treatment program (Omitted).

The Regional Administrator will determine final approval of all transfer requests.